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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

LOUIS VINSTON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I. WHETHER AN IN-COURT IDENTIFICATION BASED IN PART UPON A LINEUP CONFRONTATION PROCEDURE OCCURRING AFTER FORMAL ARREST PURSUANT TO WARRANT BUT WITHOUT PETITIONER HAVING BENEFIT OF COUNSEL MUST BE SUPPRESSED AS VIOLATIVE OF THE SIXTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S RULE IN *UNITED STATES v. WADE*, 388 U.S. 218 (1967).

II. WHETHER THE WARRANTLESS SEIZURE OF AN AUTOMOBILE, AND THE SUBSEQUENT SEARCH OF THAT AUTOMOBILE PURSUANT TO WARRANT, BASED UPON A DEFECTIVE AFFIDAVIT, VIOLATED PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS THUS REQUIRING SUPPRESSION OF ANY EVIDENCE OBTAINED DURING THE SEARCH.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Louis Vinston [hereafter Vinston], a prisoner serving a sentence of fifty years in the Arkansas Department of Correction, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas affirming Vinston's conviction and sentence is reported at *Vinston v. State*, —— Ark. ——, 625 S.W.2d 533 (December 21, 1981). A copy of the opinion is included in the Appendix.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on December 21, 1981. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3), with Vinston asserting

here, and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

Vinston notes that counsel on appeal was to file a petition for writ of certiorari to this Court. No such petition was filed in the normal time for consideration of such a writ. Vinston obtained new counsel to complete this petition. Since this is a criminal appeal the time limit is not jurisdictional and Vinston would ask that this Court exercise its discretion and consider this petition on its merits. See *Sanabria v. United States,* 437 U.S. 43 (1978); *Schact v. United States,* 398 U.S. 58 (1970); *Taglianetti v. United States,* 394 U.S. 316 (1969).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1, United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Vinston was convicted of aggravated robbery and theft of property, as an habitual offender, and was sentenced to serve a term of fifty years in the Arkansas Department of Correction. The information filed against him in November, 1980, alleged that Vinston had committed an armed robbery, and resulting theft, of a jewelry store in Little Rock, Arkansas, on October 30, 1980.

Vinston was arrested on October 31, 1980, at a garage that he owned with another man. The arrest was based in part upon the location of an automobile that allegedly bore the same license plate number as Vinston's. The arrest, made pursuant to an arrest warrant, was also based in part upon a tenative identification of Vinston by the victims of the robbery.

After being arrested and taken into custody Vinston was placed in a lineup identification procedure. He had requested counsel and had refused to sign a waiver of counsel at the presentation. Besides the victims, members of the Little Rock Police Department, a deputy prosecuting attorney, and defense counsel for another suspect were present at the lineup procedure. It was pointed out that during the lineup Vinston was apparently wearing the same shirt that he had on in the photograph used by the police for an earlier photographic array.

At the time of Vinston's arrest the police noted that an automobile matching the description of the one that was supposed to have been used in the robbery was at the garage that Vinston co-owned. A Little Rock Police Detective, acting on his own authority, took the keys from Vinston, seized the automobile, and had it towed to a police lot. Later, an affidavit was filed seeking a search warrant and a search of the car was conducted pursuant to warrant. Several items seized during this search were introduced into evidence against Vinston.

The affidavit for the search warrant, based upon double hearsay and never stating a reason why the affiant believed that goods from the robbery were in the car, was deemed sufficient by the local magistrate and a warrant was issued.

Vinston challenged the lineup identification procedure and the search of the automobile. A general motion to suppress the evidence was filed on his behalf by trial counsel, and a full evidentiary hearing on all issues was held prior to trial. These issues were raised on appeal of the Supreme Court of Arkansas and were addressed by that Court in its opinion.

The Supreme Court of Arkansas concluded that there was no problem with the lineup identification procedure. Further, it concluded, over two dissents, that the warrantless seizure of the automobile did not invalidate the later search pursuant to warrant. The Court also had no problems with the sufficiency of the affidavit for the warrant. From the affirmance of the conviction and sentence, Vinston seeks a writ of certiorari from this Court to review the decision of the lower court.

REASONS FOR GRANTING THE WRIT

1. THE IN-COURT IDENTIFICATION OF PETITIONER WAS MADE IN VIOLATION OF HIS RIGHTS TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND SHOULD HAVE BEEN SUPPRESSED.

Vinston was identified by the victims of the robbery as one of the assailants. This identification was based in part upon a lineup confrontation that occurred after Vinston's formal arrest. Despite his request for counsel, and his refusal to sign a waiver of counsel, Vinston was forced to stand in the lineup procedure.

An attorney present at the procedure for another defendant noted that some of the people viewing the lineup had to see it on more than one occasion. There was some testimony that suggestive methods were used to achieve an identification. For example, it was shown that the shirt Vinston wore in the lineup was the same, or very similar to, the one that he was wearing in a mug shot that was earlier shown to the victims. (See R. 45 as compared to R. 54). Further, when one of the victims commented that Vinston's complexion was not the same in the photograph as the person he remembered to have committed the robbery, a police detective assured him that that was not unusual. (R. 84)

The victims were asked to view two lineups. One for black people and one for white people. One of the victims picked out a white person also but that person was released because it was not the right person. (R. 113) The attorney that was present at the lineup for his white client noted that upon that person being picked, the police commented

that the victim had made a bad choice. (R. 130) The trial court credited this testimony. (R. 133)

In making its ruling denying the motion to suppress, the trial court indicated at first that there was no suggestiveness in the procedure. Then the court expressed doubts and went on to say:

> THE COURT: There may have been some suspicion cast on this entire lineup procedure, but I do think that the preponderance of the evidence weighs in favor of the State in that it weighs in favor of the proposition that the lineup was not impermissibly suggestive. (R. 135)

The trial court, then, seems to say that there was *some* suggestiveness in the procedure but that after the fact at a hearing on a motion to suppress it could not state that it was so suggestive as to warrant suppression of the in-court identification by the victims.

The attorney testified that before going into the lineup the victims were told to pay attention to various things. For instance, the height, posture, or *clothing* of the people in the lineup. (R. 94) When he suggested that the method in which the lineup was being conducted (as to his white client) was not fair, he got into an argument with the police detective conducting the lineup. (R. 99) Again, it is remembered that the trial court totally credited this testimony.

This procedure was not an investigative procedure only. This lineup occurred *after* Vinston was formally under arrest pursuant to warrant. (R. 149) The arrest warrant was based upon a "conditional," identification of Vinston's photograph by one of the victims. (R. 149)

Although no formal information was yet filed, this arrest was a formal arrest. The procedure became adversarial in nature and a confrontation occurred. A deputy prosecuting attorney was present observing the procedure. (R. 93)

Vinston did not have counsel at this lineup. The right to counsel is the right to have counsel present at critical stages of a criminal prosecution. The question presented in this petition is whether the right to counsel attaches during a post-arrest, pre-indictment lineup procedure? If so, the question becomes whether a lineup conducted under those circumstances is unconstitutional, and the results of that lineup must be suppressed in evidence? The ultimate question, then, is whether the identification of Vinston by the victims of this robbery should have been precluded from presentation to the jury.

It is clear that there is a Sixth Amendment right to counsel at a lineup procedure that occurs after a formal charge has been filed in a criminal case. At that time any actions that occur directly involving the accused in a confrontation are critical stages of the prosecution. *United States v. Wade*, 388 U.S. 218 (1967). This rule has been applied to the States through the Fourteenth Amendment Due Process Clause. *Gilbert v. California*, 388 U.S. 263 (1967).

Of course there can be a waiver of counsel in any situation if it is knowingly and intelligently made. The facts in this case, however, indicate that no such waiver occurred. [R. 41 (rights waiver form)] Or, as one of the police detectives testified, "He (Vinston) did not want to sign anything." (R. 27)

The Court has not definitely stated that the Wade/Gilbert rule applies after formal arrest but before formal indictment. It has held that there is no constitutional right to counsel during mere investigative stages of prosecutions. See *Simmons v. United States*, 390 U.S. 377 (1968). But, in this case a formal arrest had been made pursuant to warrant.

Vinston was not being arrested for investigative purposes. He was under formal arrest pursuant to a warrant issued in part upon the conditional identification of his photograph by the victims of this offense. Due to the confused testimony in this record and the indication by the trial court that there was some suggestiveness, it is clear why this Court has indicated that a right to counsel should attach to such situations.

In *Moore v. Illinois*, 434 U.S. 220 (1977), the Court recognized that the right to counsel at a lineup procedure attached at least during the preliminary hearing stage. The Court rejected the argument that since the preliminary hearing was to determine if there were probable cause to hold the defendant, the right to counsel at such a proceeding when a victim shows up and makes an identification is not critical.

Vinston argues that this is virtually the same situation. Hence, the rule in *Moore v. Illinois* should be extended to proceedings after formal arrest. Although other people were in the lineup procedure, this was an ultimate decision as to whether to maintain the charges against him. As was pointed out above, a second lineup was being held trying to identify a white offender (and the one chosen by the eyewitnesses was released).

Because of the uncounseled identification procedure, Vinston was effectively denied the opportunity to fully develop what transpired at the "suspicious," lineup in this case. It should be remembered, however, that until this lineup was conducted, there was only a conditional identification of Vinston. Because the police did not secure counsel for Vinston and forced him to proceed without the benefit of counsel, then the lineup identification should have been suppressed.

Further, the identification of Vinston by the victims of this offense should not have been permitted at trial. *United States v. Wade, supra; Moore v. Illinois, supra.*

This Court should grant the petition for certiorari in this case. The Court should rule that after a formal arrest pursuant to warrant any lineup confrontations to which the accused is a party must be counseled (absent a waiver of counsel), or identifications will be suppressed. The exclusion of such evidence should date back not only to the lineup procedure, but should include any identification testimony of the defendant by the victims.

II. THE SEIZURE OF PETITIONER'S AUTOMOBILE WAS IN VIOLATION OF THE FOURTH AMENDMENT, AND THE SUBSEQUENT WARRANT TO SEARCH THE CAR WAS BASED UPON A DEFECTIVE AFFIDAVIT, THUS THE FRUITS OF THE SEIZURE AND SEARCH SHOULD BE SUPPRESSED.

The Fourth Amendment protects citizens from unreasonable searches and seizures. If a violation occurs then evidence that is seized pursuant to the search or seizure is

suppressed. This protection against unreasonable government intrusion is applied to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

An exception to the warrant requirement of the Fourth/Fourteenth Amendment has developed in the case of automobiles. The theory is that if a search of an automobile is not made then evidence may be lost or destroyed. Of course, the main rationale for the warrantless search of an automobile is that it is a search incident to a lawful arrest. See *Chambers v. Maroney*, 399 U.S. 42 (1970); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

However, the seizure of an automobile, and the subsequent search of that automobile, are not automatically permitted just because the defendant is lawfully under arrest. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). This case presents a problem similar to *Coolidge* in that the car was seized pursuant to Vinston's arrest. However, Vinston was not in the car at the time of the seizure and there was no indication that he was going to drive it away.

The case is also distinguishable from *Cardwell v. Lewis*, *supra*, since Vinston did not ask the police to take care of his automobile. In fact, Vinston was told that the police were going to seize his car.

Since the police did not have a warrant, since Vinston was in custody, and since the car was on his private property (Vinston was arrested at a garage he co-owned), it is clear that the seizure of the automobile was constitutionally defective. The evidence later seized, then, should have been suppressed because of this illegal police activity.

Vinston first notes that the search in this case was of the internal compartments of the car. It is not like *Cardwell v. Lewis, supra,* where the search was of the exterior of the car. Hence, the "plain view," analogy of that case does not apply here.

Further, it cannot be argued that this was merely an inventory search for the protection of Vinston and the police. *South Dakota v. Opperman,* 428 U.S. 364 (1976). Indeed, since the police forced a lock open in this case it is clear that the State was not interested in protecting property.

The seizure was not incident to arrest. The search was not incident to arrest. The car was not in the immediate control of Vinston, nor did any exigent circumstances exist since the car was parked at a private garage. If the court rejects a *per se* rule of exclusion because of the initial police misconduct, the question becomes whether the warrant was properly issued in this case.

The Fourth Amendment requires that a warrant be issued based upon probable cause. The affidavit in support of a search warrant must clearly show that the police have reason to believe its conclusion that illegal evidence could be found in the automobile.

Although an informant was used in this case, the informant can best be characterized as a citizen informant so questions of reliability are somewhat relaxed. See *United States v. Harris,* 403 U.S. 573 (1971). The affidavit in this case was prepared by a police officer and is to be given a common sense interpretation. *United States v. Ventresca,* 380 U.S. 102 (1964). Yet, the affidavit for a search warrant cannot state mere conclusions.

Here the affidavit in question (See Appendix at A-13-15) states that: (1) the police believe fruits of the robbery are in the car; (2) that Vinston was identified as one of the robbers; (3) that a car matching the description was seen at the scene of the robbery; (4) that Vinston was arrested and the car impounded. Yet, nowhere does the affidavit give any reason to believe that fruits of the robbery are in the car. Nor does it state that Vinston was seen getting into or out of the car with packages or other items that might be fruits of the robbery. Nor does it state any reason to believe that the car is involved in the robbery.

In short, the affidavit in this case states a mere conclusion without any supporting information. As such, it is defective on its face and should be quashed. The search pursuant to warrant must also be suppressed as violative of the Fourth and Fourteenth Amendments. See *Mapp v. Ohio, supra.*

In *Spinelli v. United States,* 393 U.S. 410 (1969), and *Aguilar v. Texas,* 378 U.S. 108 (1964), the Court stated that if an affidavit for a search warrant is defective, then the search pursuant to warrant is defective. The rationale is that if an affidavit states mere conclusions, as this one here, then a warrant issued pursuant to that affidavit is really not made by a neutral and detached magistrate but by the law enforcent officer.

This Court should grant certiorari, reaffirm the principle that affidavits for search warrants should be couched in more than conclusory terms, and suppress the fruits of this search. Further, the Court should take this opportunity to state that when one illegal act has occurred (here the seizure of the automobile), subsequent actions will not overcome the taint created by the illegality.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted, the decision of that court reversed on both counts, and the cause remanded for trial without the identification or the fruits of the illegal search. This Court should set this matter for oral argument on the issues set out above.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, one of the counsel for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition and the accompanying appendix have been served on opposing counsel this 4th day of June, 1982, by mailing, first class postage prepaid, copies of same to the Honorable Steve Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas 72201.

/s/ Thomas M. Carpenter

APPENDIX "A"

IN THE SUPREME COURT OF ARKANSAS

No. CR 81-72

LOUIS HENRY VINSTON ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

December 21, 1981

Defendant was convicted in the Pulaski County Circuit Court, Fifth Division, Lowber Hendricks, J., of armed robbery, and he appealed. The Supreme Court, Hickman, J., held that: (1) where warrant had been obtained for defendant's arrest and thereafter detective arrested defendant and seeing his vehicle at garage decided it should be seized to prevent removal or destruction of any evidence or contraband, seizure of automobile was not unreasonable or in violation of Fourth Amendment; (2) where both victims testified they got good look at robbers and identification was made less than 24 hours after crime was committed, trial court did not err in admitting identification testimony, notwithstanding claim that victims were repeatedly taken through lineup and suggestions were made by police; and (3) evidence established sufficient chain of custody.

Affirmed.

Adkisson, C.J., dissented with opinion in which Purtle, J., joined.

1. SEARCHES AND SEIZURES

State has burden of justifying warrantless seizure of vehicle; however, automobile does not enjoy same constitutional protection that a home does because of its mobility and because one does not have same expectation of privacy in a vehicle as one would in a house. U.S.C.A. Const. Amend. 4.

2. SEARCHES AND SEIZURES

Seizure of vehicle is justified when confederates or others might remove vehicle. U.S.C.A. Const. Amend. 4.

3. SEARCHES AND SEIZURES

Where warrant had been obtained for defendant's arrest and thereafter detective arrested defendant and seeing his vehicle at garage decided it should be seized to prevent removal or destruction of any evidence or contraband, seizure of automobile was not unreasonable or in violation of Fourth Amendment. U.S.C.A. Const. Amend. 4.

4. CRIMINAL LAW

Whether identification is tainted depends upon opportunity to observe the criminal, accuracy of victim's description, amount of certainty of victim at time of confrontation and length of time between crime and identification.

5. CRIMINAL LAW

Where both victims testified they got good look at robbers and identification was made less than 24 hours after crime was committed, trial court did not err in admitting identification testimony, notwithstanding claim that vic-

tims were repeatedly taken through lineup and suggestions were made by police.

6. SEARCHES AND SEIZURES

Valid search warrant may issue based upon hearsay information as long as there is substantial basis from crediting hearsay.

7. SEARCHES AND SEIZURES

Where search warrant for vehicle was signed by one of detectives and was based on positive identification of defendant by robbery victims, search warrant was valid, notwithstanding claim that it was deficient because it was based on hearsay.

8. CRIMINAL LAW

In prosecution for robbery evidence that defendant's vehicle was towed to fenced lot used by police for storing such vehicles, that enclosure was locked, and that officer had to force open trunk because key that was taken from defendant would not open the trunk established sufficient chain of custody of items recovered from trunk of vehicle.

McArthur & Lassiter, P.A., Little Rock, for appellant.

Steve Clark, Atty. Gen., by Leslie M. Powell, Asst. Atty. Gen., Little Rock, for appellee.

HICKMAN, Justice.

Louis Henry Vinston was one of three men suspected of participating in an armed robbery of Henshaw Jewelry,

a small shop located in the Park Plaza Shopping Center in Little Rock, Arkansas. Late in the afternoon of October 30, 1980, two men, one black and one white, armed with pistols, forced the owners of the store, Mr. and Mrs. Henshaw, into a back room and proceeded to empty the display cases of jewelry and steal other valuable property in the store. During the course of the robbery, a white accomplice entered the store. It was estimated that the jewelry store was worth about $30,000 and the scrap gold taken was worth $36,000. Vinston was convicted of aggravated robbery and theft and sentenced to fifty years imprisonment for the robbery and twenty years for the theft. His sentences were enhanced because of four or more prior convictions.

Vinston's arguments of error on appeal relate to search and seizure, his identification, the validity of a search warrant, and the chain of custody regarding items taken from his vehicle. We find no merit to these arguments and affirm his convictions.

On Thursday afternoon, the 30th of October, 1980, Ralph Jones, the supervisor of the power plant at the shopping center, noticed suspicious conduct by two white males and one black male. He had been alerted earlier by a restaurant owner in the shopping center to be on the lookout for thieves who were stealing meat from the restaurant. The three men first drove up in a Buick automobile, parked, went into the shopping center, came out ten minutes later and left. Twenty minutes later all three returned in a Ford LTD automobile being driven by the black man. The three men got out of the car carrying green plastic bags. One of the white men returned to the Ford and left. Jones wrote down the license numbers and a description of both the Buick and the Ford on a scrap of paper. About the Ford he

wrote: ELP 871, LTD Four Door, 1977. Jones could not say which store the men entered.

During this period of time Henshaw's jewelry store was robbed. According to the Henshaws the robbers stayed for about fifteen minutes, none of them had masks on, and the store was well lit. After the robbery the Henshaws called the police. The next morning Jones, the plant supervisor, called the police and gave them a description of the vehicles that he had seen and related what he had observed. That same morning at 8:30 a detective took six photographs of black men to the Henshaws and both of them identified Vinston as one of the robbers.

The police learned that the Ford LTD automobile described by Jones belonged to Vinston. Based on all this information a warrant was obtained for Vinston's arrest and two detectives proceeded to the L & S Garage on Mabelvale Pike that Vinston owned an interest in. The two detectives arrested Vinston at the garage at 11:00 a.m., October 31, 1980, and seeing his vehicle decided that it should be seized to prevent removal or destruction of any evidence or contraband.[1] It was seized and towed to a lot used by the police for such vehicles. Three days later, on Monday, a search warrant was obtained for the Ford automobile. The trunk contained a shoulder holster, and numerous watches, rings and bracelets.

The day that Vinston was arrested the Henshaws and two other witnesses viewed a lineup and the Henshaws identified Vinston positively as one of the robbers.

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[1]The exact location of the vehicle is not in the record. It was at the garage, but whether it was on the public street or in a parking lot or space we cannot say.

Vinston argues on appeal that the seizure of his vehicle was unreasonable and was, therefore, in violation of the Fourth Amendment to the United States Constitution. We disagree.

[1] The State had the burden of justifying the warrantless seizure of the vehicle. *Cardwell v. Lewis*, 471 U.S. 583, 94 S.Ct. 2464, 41 L.Ed. 2d 325 (1974). However, the United States Supreme Court has consistently recognized that an automobile does not enjoy the same constitutional protection that a home does because of its mobility and because one does not have the same expectation of privacy in a vehicle as one would in a house. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970). This has come to be known as the automobile exception and its application has many facets. This case does not fall within the rule that allows the search of part of the vehicle that is within the immediate reach or control of the one arrested. *New York v. Belton*, —— U.S. ——, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969). This is a case similar to *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). In the *Coolidge* case the police seized a vehicle in the driveway of a private residence without a warrant and seizure was held to be unreasonable because there were no exigent circumstances. In doing so, however, the court pointed out six circumstances that affected their decision, six reasons why exigent circumstances did not exist: 1. The police had known for some time of the probable role of the vehicle in the crime; 2. The defendant was aware that he was a suspect, had been cooperative and there was no indication he would flee; 3.

He had already had ample opportunity to destroy any evidence; 4. There was no suggestion that the vehicle was being used for an illegal purpose, and it was regularly parked in the driveway of his house; 5. The opportunity for search was not "fleeting"; and, 6. The objects the police assumed to be in the car were neither stolen, contraband, nor dangerous. The counterparts of these six reasons all exist in this case: 1. The robbery had occurred just the evening before; 2. Vinston was not contacted until he was arrested the next day at 11:00 a.m.; he had no reason to know that he was a suspect or that his car had been identified as being used in the robbery, so he would have no reason to destroy any evidence or remove any contraband; 3. The vehicle was not in a private driveway but at a business establishment; 4. There were two other suspects in the case, both white, who had not been identified or arrested at the time Vinston was arrested; 5. The police had good cause to believe that they would only have this "fleeting" opportunity to seize the vehicle before someone could remove the evidence or contraband; and, 6. The police had positive information that the vehicle was used in the crime and possibly contained evidence or stolen property.

[2] The seizure of a vehicle is justified when confederates or others might remove a vehicle. *U. S. v.* 1972 *Chevrolet Nova*, 560 F.2d 464 (1st Cir. 1977); *See* W. Ringel, Searches and Seizures, Arrests and Confessions, §11.3 (1980).

[3] In *Freeman v. State*, 258 Ark. 617, 527 S.W.2d 909 (1975), we held the seizure of the accused's automobile to be unreasonable. But *Freeman* is distinguishable for several reasons: The vehicle was located on private property at a

residence; Freeman was arrested two blocks away from his vehicle; and, there had been no positive identification of the vehicle seized as being the one used in the crime. Clearly, exigent circumstances existed warranting the seizure of Vinston's vehicle.

[4, 5] Vinston's argument that his identification at the lineup was too suggestive is also meritless. Both Henshaws pointed out Vinston from six photographs in the early morning after the robbery. It is argued that the Henshaws, Jones, the plant supervisor, and Cathy Meechan, a clerk at the store next door to the jewelry store, were repeatedly taken through the lineup and suggestions were made by the police. This argument is based primarily on the testimony of a lawyer who represented one of the white suspects, Mr. Storey, who co-owned the garage with Vinston. Evidently the police were not all that suggestive because neither of the two white suspects was identified. Only Vinston was identified and only the Henshaws identified him. Mr. Henshaw said he only viewed the lineup of the black men once. Mrs. Henshaw said she viewed it twice. Both denied that any suggestions were made to them and the two detectives verified their testimony. On appeal we review the totality of the circumstances to see if the trial court's decision was clearly erroneous. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). Whether an identification is tainted depends upon several factors: The opportunity to observe the criminal, the accuracy of the victim's description, the amount of certainty of the victim at the time of the confrontation and the length of time between the crime and identification. *Washington v. State*, 273 Ark. 482, 621 S.W.2d 216 (1981). Both Henshaws testified that they got a good look at the robbers. In this case the identification

was made less than twenty-four hours after the crime was committed. The trial court's decision admitting the identification evidence was not clearly erroneous.

[6, 7] The police obtained a search warrant for Vinston's vehicle on the Monday following the robbery. The warrant was signed by one of the detectives and it was based on the positive identification of Vinston by the Henshaws and the information supplied by Mr. Jones. It is argued that the warrant was deficient because it was based on hearsay and the warrant did not come within the test of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed 2d 723 (1964). *Aguilar* dealt with an unidentified police informant and does not control. In this case the face of the warrant stated Mr. Jones' name and address, that he had observed Vinston's vehicle at the place of the robbery, and that Vinston had been arrested for the robbery. A valid warrant may issue based upon hearsay information as long as there is substantial basis for crediting the hearsay. *Rowland v. State*, 262 Ark. 783, 561 S.W.2d 304 (1978); *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), *cert. denied*, 415 U.S. 995, 94 S.Ct. 1599, 39 L.Ed. 2d 893 (1974). The search warrant was based on solid information.

[8] A rather weak argument is made that the State did not prove the chain of custody of the items recovered from the trunk of the vehicle. The unrefuted testimony of the officer was that the vehicle was towed to a fenced in lot used by the police for storing such vehicles. The enclosure was locked, and at night there were watch dogs running loose in the enclosure. The officer testified that he had to force open the trunk because the key that they had taken from Vinston would not open the trunk. Actually, Vinston claimed that he gave the officers permission to

search the vehicle at the time he was arrested and they refused to do so. He said he told them that the trunk could be opened by pulling a latch in the glove compartment of the vehicle. The officers testified that Vinston refused permission to search the vehicle when he was arrested. The officer said the trunk was forced because he did not know that this type of vehicle had a trunk latch in the glove compartment. The trial court was satisfied the State had shown a proper chain of custody and error has not been demonstrated by the appellant.

Affirmed.

ADKISSON, C.J., and PURTLE, J., dissent.

ADKISSON, Chief Justice, dissenting.

The police arrested appellant and seized his automobile. There was no testimony bearing on the appellant's location relevant to the car at the time of the arrest and seizure. We must, therefore, assume that the search incident to arrest doctrine has no applicability to this case.

This case is governed by *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), which held that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest. Warrantless searches are presumed to be unreasonable.

The State attempted to justify the seizure by proof of exigent circumstances recognized in *Coolidge* as sufficient to dispense with the warrant requirement. Although the majority finds this proof sufficient, it was, in fact, not sufficient because the determining factors making a warrant necessary in *Coolidge* are also present in this case. They

are: "advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant."

Here the police knew in advance that they wanted to seize the car. They knew it was used in the robbery and that it was registered in the name of the appellant. The police had ample opportunity to obtain a search warrant for the car at the same time they requested the arrest warrant for the appellant.

I am hereby authorized to state that PURTLE, J., joins me in this dissent.

APPENDIX "B"

STATE'S EXHIBIT NO. "1"
(RIGHTS FORM)
APPENDED TO ORIGINAL TRANSCRIPT

LINEUP RIGHTS

DATE 10-31-80
TIME 1158 HRS.

LOUIS HENRY VINSTON, DOB NO. 4-6-50

You are being asked to participate in a lineup with several other people. Persons who are witnesses to crimes in which you are a suspect will view this lineup for a possible identification. You do not have a right to refuse to stand in this lineup.

You have the right to have an attorney of your choosing present during this proceedings or to confer with an attorney prior to this lineup. If you cannot afford an attorney, one will be appointed by the court to represent you.

However you may waive your rights to have an attorney present.

WAIVER

I have read this statement of my rights and understand them. I am willing to participate in a lineup without my attorney being present.

Called his attorney Kenneth Coffelt at 1205 hrs.

SIGNED:_____

WITNESSES: Larry Dunnington
J. D. Martin

APPENDIX "C"

STATE'S EXHIBIT NO. "9"
IN THE MUNICIPAL COURT OF LITTLE ROCK, ARKANSAS

80-61912

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

AFFIDAVIT FOR SEARCH AND SEIZURE WARRANT

The undersigned, being duly sworn, deposes and says as follows: That he, the undersigned, has reasonable cause to believe and upon reasonable cause does believe that a particular automobile located at the storage lot used by the Little Rock Police Department, Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas and described as follows: a 1977 Ford, four door, white over gold LTD, Arkansas License Number ELP 871, VIN Number 7U645111686, has concealed therein fruits of the crime of Aggravated Robbery and Theft of Property of Henshaw Jewelry Store located at Park Plaza Shopping Center, University and West Markham Streets, on October 30, 1980, at approximately 5:40 p.m.

Said fruits of the crime include two hundred dollars ($200) in currency from the safe and forty dollars ($40) in currency from Mr. Henshaw, one Walther P-38 Auto Pistol, one Ansonia Antique Clock, one Howard Miller Chime Clock, one 1st Federal 30 month Stock certificate, eighteen (18) silver dollars, and approximately thirty thousand dollars ($30,000) in assorted diamonds and jewels, tending to demonstrate that an offense was committed and that certain persons committed it.

FACTS CONSTITUTING REASONABLE CAUSE:

1. The above described automobile belongs to Louis Vinston of 3325 W. 9th Street, Little Rock, Arkansas, a black male, thirty (30) years old, date of birth 4-6-50. This individual has been identified as a person involved in said aggravated robbery and theft of property and has been arrested and charged with said crime by the Little Rock Police Department.

2. That on October 30, 1980, the date of the commission of the said crime, at approximately 5:35 p.m. the above described automobile, registered to Louis Vinston, the above mentioned individual, was observed by Ralph Jones, 6300 B Street, Little Rock, Arkansas, an employee of the Park Plaza Shopping Center, at the power plant parking area for approximately five (5) to ten (10) minutes.

3. That the above mentioned Louis Vinston was arrested on October 31, 1980, and the above described automobile was impounded by members of the Little Rock Police Department at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas at approximately the same time on October 31, 1980, and has remained in custody, locked and secured at the above location over the weekend until members of the Little Rock Police Department could obtain a search and seizure warrant.

THEREFORE, the undersigned prays that a search and seizure warrant issue for the above described automobile at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas.

/s/ Larry Dunnington

L. Dunnington, Affiant
Detective, Little Rock Police Dept.

SUBSCRIBED AND SWORN to before me at 600 Markham St. on this 3rd day of November, 1980. I find that there is sufficient reasonable cause to issue a search and seizure warrant for the property described in the list above.

/s/ William R. Butler
Judge

APPENDIX "D"

STATE'S EXHIBIT NO. "10"
IN THE MUNICIPAL COURT OF LITTLE ROCK, ARKANSAS

80-61912

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

SEARCH AND SEIZURE WARRANT

TO ANY SHERIFF, CONSTABLE OR POLICEMAN IN THE STATE OF ARKANSAS:

On Affidavit having been made before me by Det. Larry Dunnington, of the Little Rock Police Department, that he has reason to believe that in a 1977 Ford, 4 door, white over gold LTD automobile, Arkansas License Number ELP 871, VIN NO. 7U645111686, which is located at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas, there is now being concealed certain evidence of the crimes of aggravated robbery and theft of property, said property being described as follows: two hundred and forty ($240) in currency, one Walther P-38 auto Pistol, one Ansonia Antique Clock, one Howard Miller Chime Clock, one First Federal Savings & Loan thirty (30) month stock certificate, eighteen (18) silver dollars and approximately thirty thousand dollars ($30,000) in assorted diamonds and jewels, tending to demonstrate that the offense of aggravated robbery and theft of property were committed and that certain persons committed them, and as I am satisfied that there is reasonable cause to believe that the above described property and evidence is concealed in the above

described premises, and that on the foregoing grounds reasonable cause for issuance of the Search Warrant exists.

YOU ARE HEREBY COMMANDED AND DIRECTED to search the 1977 Ford, 4 door, white over gold, Arkansas License Number ELP 871, VIN NO. 7U645111686, LTD automobile located at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas, and to seize the above described evidence and property and to leave a copy of this warrant with the person in apparent control of said premises, or affix a copy of said warrant thereto, and to prepare a written inventory of the property seized and return this warrant and a copy of said inventory, and to store the property seized as required by law. Furthermore, this seach warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m. and within a reasonable time, not to exceed sixty (60) days from the date of issuance. Return shall be made to the issuing judicial officer within five (5) days after execution.

DATED this 3rd day of November, 1980.

/s/ William R. Butler
Judge